

DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 21-1724

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 6:30 p.m. on August 9, 2021, on the application of **STEPHEN CALLAHAN** and **ELIZABETH CALLAHAN** (the “Applicants”). The Applicants are requesting approval of one Critical Area variance from the Critical Area Buffer (including the expanded buffers as described herein; collectively, the Critical Area Buffer and any expanded buffers may be described as the “Buffer”) for construction of a 12-foot-wide residential driveway, resulting in approximately 2,597 square feet of permanent disturbance within the Buffer, for the purpose of providing access to a portion of their building envelope.

The subject property (the “Property”) is an approximately 28.639 acres, waterfront parcel, currently unimproved, that is situated partially within the Critical Area, owned by the Applicants¹ and located at 8417 Church Neck Road, St. Michaels, MD 21663. It is shown on tax map 32, grid 1 as parcel 1, lot 3, and is part of the former San Domingo Farm, which was originally subdivided in 2005. The Applicants intend to construct a residence on the Property, which is currently under agricultural production and is split-zoned; approximately 16 acres are classified as Resource Conservation (“RC”), and approximately 12 acres are classified as Countryside Preservation (“CP”). The RC portion of the Property has a 15 percent lot coverage allowance and a 50-foot front-yard setback, 25-foot side- and rear-yard setbacks and a 100-foot tidal wetland setback. The CP portion of the Property does not have a lot coverage limit. It has a 50-foot front-, side- and rear-yard setbacks.

¹ At the time of the hearing, the Applicants were under contract to purchase the Property from San Domingo, LLC. The Property was conveyed by deed to the Applicants on August 16, 2021.

The Property is bound to the north by Mount Pleasant Road, several smaller residential lots and a larger forested parcel. It is bound to the south by lots 1 and 2 of the San Domingo Farm subdivision. It is bound to the east by an unimproved portion of land owned by the Commissioners of St. Michaels as well as a larger residential lot that was part of a previous subdivision known as “Fleagane Acres.” It is bound to the west by Church Neck Road and a large, predominantly forested parcel that also contains agricultural fields and a residential dwelling. San Domingo Creek abuts the southeast portion of the Property.

The expanded buffer areas of the Property consist of hydric soils that are mapped as “Ota” Othello silt loam. Othello soils are indicative of the coastal plain area and make up about 30 percent of the soils in Talbot County. The Property was field investigated by Bruce Bagley, Certified Professional Soils Consultant, to confirm the hydric soils line as shown on a 2005 subdivision plat, in a report titled “Site Plan on the lands of San Domingo, LLC” prepared by Lane Engineering, LLC and dated June 21, 2021 (hereinafter, the “Site Plan”).

Applicants’ request is made in accordance with Chapter 190 Zoning, Article VII §190-58.4; Article III, §190-15; Article II, §190-8.2 and Article II, §190-8.5 of the *Talbot County Code* (the “Code”). Relevant Critical Area provisions are included in Title 8, Subtitle 18 of the Natural Resources Article of the *Maryland Annotated Code* (the “Critical Area Program”) and COMAR Title 27.

Present at the hearing were Board of Appeals members Phillip Jones, Chairman; Frank Cavanaugh, Vice Chairman; Paul Shortall and Zakary Krebeck, and alternate member Patrick Beard. Zach Smith, Esq. of Armistead, Lee, Rust & Wright, P.A., 114 Bay Street Building C, Easton MD 21601, appeared on behalf of the Applicants, along with and Sean Callahan, Senior Planner, Lane Engineering, LLC, 117 Bay St, Easton, MD 21601. Elisa DeFlaux, Planner II, and

Brennan Tarleton, Assistant Planning Officer, attended the hearing on behalf of Talbot County. William C. Chapman was the attorney for the Board of Appeals (the “Board”). Willard C. Parker, II, Esq. was present in the audience on behalf of San Domingo, LLC, seller of the Property to the Applicants. A member of the public was also present. It was noted for the record that each member of the Board had individually visited the site. The Applicants were sworn in.

The following exhibits were offered and admitted into evidence as Board’s Exhibits as indicated:

1. Application for a Critical Area Variance and a Non-Critical Area Variance with Applicants’ narrative as Attachment A.
2. Tax Map with subject property highlighted.
3. Notice of Public Hearing for advertising in *The Star Democrat* newspaper.
4. Newspaper Confirmation.
5. Notice of Public Hearing and Adjacent Property Owner List.
6. Standards for Critical Area Variance with Applicants’ responses as Attachment B.
7. Staff Report prepared by Elisa DeFlaux, Planner II.
8. Sign Maintenance Agreement/Sign Affidavit.
9. Comments from Critical Area Commission.
10. Authorization letter from Applicants.
11. Independent Procedures Disclosure and Acknowledgment Form.
12. Aerial Photos.
13. Declaration of Covenants and Restrictions.
14. “Site Plan on the lands of San Domingo, LLC” prepared by Lane Engineering, LLC, dated June 21, 2021.

The following exhibits were offered and admitted into evidence as Applicants' Exhibits as indicated:

1. Plats titled "San Domingo Farm", recorded in the Land Records for Talbot County Maryland in Plat Book MAS 81, pp. 633-635).
2. Photos of the wetland areas on the subject property.
3. Letter from Bruce B. Bagley, CPSS to Sean Callahan, Lane Engineering, LLC, dated July 28, 2021.

Mr. Smith began his presentation stating that he would both testify on behalf of, and advocate for, the Applicants, who he said had offered to travel from out of state until County staff indicated their appearance would not be necessary. Mr. Smith entered a series of three plats collectively titled "San Domingo Farm" (recorded in the Land Records for Talbot County Maryland in Plat Book MAS 81, pp. 633-635) as Applicants' Exhibit 1 (collectively, the "Subdivision Plat"). When Lane Engineering, LLC, initially examined the Subdivision Plat and site to perform a feasibility study, Mr. Smith said, the first task was to map the buffers pursuant to current Critical Area regulations. One of the changes since the 2005 Subdivision Plat that is shown in the Site Plan, he said, is the 100-foot buffer to the stream on the Property's northern line. Although the stream buffer was added as part of the regulated Critical Area since the 2005 Subdivision Plat, it does not affect the proposed dwelling location, Mr. Smith, said. However, it does have an impact on placing a driveway to access the proposed dwelling. Although the driveway can be located outside the stream buffer, Mr. Smith said, the required expanded buffer zone for hydric soils covers almost the entire frontage of the Property, as illustrated on the Site Plan. A potential path to the south of the of the main expanded buffer seemed possible, Mr. Smith said, but it appeared to be too wet to locate a driveway. On June 14, 2021, Lane Engineering representatives met at the Property with Chris Pajak of the Maryland Department of

the Environment (“MDE”) Wetlands and Waterways Program. Mr. Pajak confirmed that the potential southern path would encroach on regulated nontidal wetlands, documented on the Site Plan. Mr. Smith entered photos of the wetland areas as Applicants’ Exhibit 2. Without a variance allowing a driveway to pass through a portion of the expanded buffer, Mr. Smith said, the Applicants would not be able to access their homesite or fully utilize their riparian rights, for which access is a key consideration.

Mr. Callahan testified on behalf of the Applicants. He said that, in preparing the Site Plan, Lane Engineering applied current Critical Area regulations over the 2005 Subdivision Plat, including the stream buffer, and confirmed both the stream buffer and regulated wetlands with MDE. Mr. Callahan said that he consulted with Bruce Bagley, Certified Professional Soils Consultant, in an attempt to determine, with better precision than soil maps can provide, the extent of hydric soils on the Property. Through consultation with Mr. Bagley, the hydric soil areas were able to be reduced, but no further than as depicted on the Site Plan. Mr. Smith entered a letter from Bruce B. Bagley, CPSS, dated July 28, 2021, summarizing the results of Mr. Bagley’s soil examination, into evidence as Applicants’ Exhibit 3.

Mr. Cavanaugh asked how the Applicants determined that they needed a 12-foot-wide driveway. Mr. Callahan said that, while the Code minimum is 8 feet, 12 feet is more comfortable and reasonable and allows some room for service vehicles. In response to a question from Mr. Krebeck, Mr. Smith said the driveway design would include side swales or elevation to allow enhanced dissipation of stormwater runoff in order to comply with the Code’s stormwater management requirements.

Mr. Parker spoke on behalf of San Domingo, LLC and its principal, Carol von Bernuth, retired general counsel for the Union Pacific Railroad Company, describing a history of his

client's ownership of the Property, purchased in 2005 with the intent to build a home to be closer to Mr. von Bernuth's son who was stationed in Washington with the United States Foreign Service. Those plans were placed on short-term hold when Mr. von Bernuth's son was stationed overseas, and then indefinitely when the same son developed a terminal illness, Mr. Parker said. His client made the decision in recent years to market the Property. With the 2010 change in Critical Area law requiring expanded buffers on the Property, the only way to access a potential home site in the waterfront portion and utilize the Property's riparian rights was through a variance, Mr. Parker said, and the Applicants were willing to go through that process. "In my 47 years practicing before this board," Mr. Parker said, "few cases so clearly require a variance."

Mr. Shortall said a driveway is necessary to reach a proposed dwelling and the water. Mr. Krebeck said the Applicants have exhausted all other options. Mr. Beard said the Applicants had taken steps to mitigate any disturbance to wetland areas, and that the proposed driveway and variance request "made sense." Mr. Cavanaugh agreed, saying that the proposed driveway was necessary and situated in the "least harmful area." He said the 12-foot driveway was reasonable for a parcel this size. Mr. Jones said he has the same types of soil on his own property, with a 9-foot-wide driveway, and would personally recommend a wider driveway for a lane of this length. Although the Property has buildable areas elsewhere, Mr. Jones said, it is well established in Maryland, including in appellate court decisions, that an owner of waterfront property, taxed as waterfront property, has a right to access the waterfront. Mr. Jones recommended that, in addition to staff conditions, that if the variance request is approved, special conditions included in the Subdivision Plat should also apply.

Mr. Cavanaugh made a motion to approve the requested Critical Area variance. Mr. Beard seconded the motion, and the motion passed unanimously.

The Board made the following findings of fact and conclusions of law:

1. All legal requirements pertaining to a public meeting were met.
2. Special conditions or circumstances exist that are peculiar to the land or structure such that a literal enforcement of the provisions of this chapter would result in unwarranted hardship. The Property was part of a four-lot subdivision of the San Domingo Farm in 2005. The original Subdivision Plat identified areas of tidal and nontidal wetlands that were verified by the Maryland Department of the Environment. At the time of the recorded Subdivision Plat, there were no expanded buffers identified on the Property. However, 2010 modifications to Critical Area regulations created provisions and criteria for expanded buffers beyond the standard 100-foot Buffer, in areas where hydric soils, highly erodible soils and steep slopes were present. According to the Site Plan, which includes newer survey work specific to the Property, there are additional applicable expanded buffers due to the presence of highly erodible soils. Based upon the Buffer and expanded buffers as shown on these plans, the Applicants would not be able to obtain access to the waterfront building envelope on the south portion of the Property, where they have shown the proposed location of a future dwelling, without first obtaining a variance. Although lot area does exist outside of the Critical Area and Buffer, the strict application of the Critical Area provisions would restrict the Applicants from accessing and constructing a dwelling in the waterfront portion of the Property and enjoying their riparian rights.

3. A literal interpretation of the Critical Area requirements will deprive the property owner of rights commonly enjoyed by other property owners in the same zoning district. The requirement for the expanded buffers, coupled with the Property's existing configuration, creates an impediment to constructing permanent access to the waterfront portion of the Property without a variance. The allowance of roadway access to a home site, and the ability to access riparian rights, are rights enjoyed by property owners in Talbot County.
4. The granting of a variance will not confer upon the property owner any special privilege that would be denied by this chapter to other owners of lands or structures within the same zoning district. The granting of a variance will allow the Applicants to establish a driveway access from Church Neck Road to their proposed home site. The proposed dwelling is within the required setbacks and would not require variances to be constructed as shown on Applicants' Site Plan. However, due to existing environmental constraints and the Property's configuration, the Applicants have no way to access this portion of the Property's waterfront building envelope without the granting of a variance.
5. The variance request is not based on conditions or circumstances which are the result of actions by the Applicants, including the commencement of development activity before an application for a variance has been filed, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property. The Applicants, at the time of the hearing, were contract purchasers of the Property and now owners of the Property.

They have not taken any actions that have resulted in the need for the variance requested as part of this application.

6. The granting of the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat, and the granting of the variance will be in harmony with the general spirit and intent of the state Critical Area law and the Critical Area Program. The Critical Area regulations require expanded buffers in the presence of hydric soils because the identified soils are susceptible to frequent flooding and/or high water tables. The expanded buffer to the east and nontidal wetlands to the west of the Property create a situation in which the southern portion of the Property would be inaccessible without some type of disturbance to the Buffer. There appears to be no alternative solution onsite that would lessen the extent of the impacts to the Buffer while also allowing a permanent access to be established to the waterfront portion of the Property. Applicants will be required to mitigate any impacts to the Buffer from the driveway construction at a 3:1 ratio. In an effort to offset any potential impacts with respect to water quality, mitigation planting could be placed within the Buffer along the proposed driveway to enhance the Buffer's functionality within the area of impacts. Dense native herbaceous vegetation is suitable for this area and would provide both water quality and habitat enhancements. Additionally, the Applicants will be required to address stormwater management for the disturbance included in both the driveway as well as the proposed dwelling.
7. The variance shall not exceed the minimum adjustment necessary to relieve the unwarranted hardship. The granting of the variance will allow the Applicants to

establish a driveway access from Church Neck Road to the proposed home site on the Property. The location of the proposed driveway is placed such that it disturbs as little as possible of an expanded buffer in order to create straight-line access to the proposed dwelling. The proposed dwelling is within the required setbacks and would not require variances; however, due to the existing environmental constraints and the Property's configuration, the Applicants have no way to access the Property's waterfront building envelope without a variance.

8. If the need for a variance to a Critical Area provision is due partially or entirely because the lot is a legal nonconforming lot that does not meet current area, width or location standards, the variance should not be granted if the nonconformity could be reduced or eliminated by combining the lot, in whole or in part, with an adjoining lot in common ownership. This section is not applicable.

HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY
THE TALBOT COUNTY BOARD OF APPEALS,

RESOLVED, that the Applicants, **STEPHEN CALLAHAN** and **ELIZABETH CALLAHAN** (Appeal No. 21-1724) are **GRANTED** the requested variance consistent with the evidence presented to the Board of Appeals, subject to the following conditions:

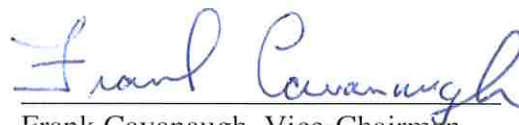
1. Applicants shall complete a Buffer Management Plan that complies with all the requirements of the Critical Area Law. The Applicants shall provide 3:1 mitigation for any permanent disturbance within the Buffer and 1:1 mitigation for any temporary disturbance within the Buffer.
2. Applicants shall commence construction on the proposed improvements within eighteen (18) months from the date of the Board of Appeals' approval.

3. Applicants shall comply with and address all Critical Area Commission comments and requirements, including the completion of a Buffer Management Plan that complies with Critical Area Law.
4. Applicants shall comply with all conditions including within the Subdivision Plat, titled "San Domingo Farm" and recorded in the Land Records for Talbot County Maryland in Plat Book MAS 81, pp. 633-635.

GIVEN OVER OUR HANDS, this 27th day of October, 2021.


TALBOT COUNTY BOARD OF APPEALS


Phillip Jones, Chairman


Frank Cavanaugh, Vice-Chairman


Zakary Krebeck, Member


Paul Shortall, Member


Patrick Beard, Alternate Member